

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

TIMOTHY PEREZ	)	CIVIL ACTION NO.
		5:13-cv-00214-HLH
V.	)	
THE PHOENIX RECOVERY GROUP	)	

**DEFENDANT'S MOTION TO DISMISS and MEMORANDUM LAW IN SUPPORT**

Now comes Defendant as follows:

1. This motion is brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

2. In Count VII of Plaintiff's Complaint, consisting of Paragraphs 34 and 35, the Plaintiff has alleged that Defendant violated § 392.303(a)(2) of the Texas Debt Collection Act.

3. § 392.303(a)(2) of the Texas Debt Collection Act, provides:

(a) In debt collection, a debt collector may not use unfair or unconscionable means that employ the following practices:

(2) collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer;

4. Plaintiff's complaint contains no allegation that Defendant collected or attempted to collect interest or a charge, fee, or expense incidental to the obligation.

Count VII only alleges that Defendant called repeatedly and continuously.

Even if Defendant called repeatedly or continuously (which is denied), that conduct, even if true, is not listed in § 392.303 as an unfair or unconscionable action.

Therefore, Plaintiff has no cause of action for unconscionable or unfair means of collection for the alleged conduct of repeated or continuous calling under § 392.303.

Consequently, Plaintiff has not stated any claim in Count VII, Paragraphs 34 and 35 of his Complaint, upon which relief may be granted because such conduct is not defined as an unconscionable or unfair means of collection. The allegation lacks the material elements that Defendant collected or attempted to collect interest or a charge, fee, or expense incidental to the underlying debt obligation which was unauthorized or legally chargeable. Because these elements are not pleaded, Count VII fails to state a claim upon which relief can be granted.

5. Accordingly, Count VII must be dismissed and stricken.

6. **Podiatrist Assn. Inc. v. La Cruz Azul de Puerto Rico, Inc.**, 332 F.3d 6, 19 (1<sup>st</sup> Cir. 2003)(If the factual averments do not justify recovery on some theory adumbrated in the complaint, then, and only then, can we affirm a dismissal for failure to state an actionable claim. The complaint must therefore set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory). **Conley v. Gibson**, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957)(a court should dismiss a suit under FRCP 12(b)(6) only if appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief). *See also*, **Doe v. Hillsboro ISD**, 81 F.3d 1395 (5<sup>th</sup> Cir. 1996); **Crowe v. Henry**, 43 F.3d 198 (5<sup>th</sup> Cir. 1995). **Scanlan v. Texas A&M Univ.**, 343 F.3d 533 (5<sup>th</sup> Cir. 2003).

Also, a motion to dismiss may be granted when there is no basis in law for the claim. **Kirksey v. R. J. Reynolds Tobacco Co.**, 168 F.3d 1039, 1041-42 (7<sup>th</sup> Cir. 1999).

WHEREFORE, Defendant prays that this motion be granted.

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**CERTIFICATE OF SERVICE**

I certify that the foregoing document has been filed through the ECF/CM system on May 17, 2013 in PDF format and that system will give notice electronically to the following counsel of record.

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**ORDER**

On this day the Court considered the motion of Defendant to Dismiss Count VII of the Plaintiff's Complaint under the provisions of Rule 12(b)(6), Fed. R. Civ. P.

The Court finds that the motion is meritorious and should be granted.

IT IS, THEREFORE ORDERED that Count VII of the Plaintiff's Complaint is dismissed with prejudice because it does not state a claim upon which relief may be granted.

Signed on \_\_\_\_\_, 2013.

\_\_\_\_\_  
U.S. DISTRICT JUDGE